No. 21,431

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COMMISSIONER OF INTERNAL REVENUE,

Petitioner

v.

MORGAN GUARANTY TRUST COMPANY, TRUSTEE AND TRANSFEREE OF THE ESTATE OF ROBERT RODGER GLEN, DECEASED, and ESTATE OF ROBERT RODGER GLEN, DECEASED, CLAIRE HUNTINGTON GLEN, EXECUTRIX,

Respondents

ON PETITION FOR REVIEW OF THE DECISIONS OF

THE TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONER

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I N D E X

CITATIONS

Cases:

Statutes:

Miscellaneous:

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I

DECEDENT DID NOT RECEIVE CONSIDERATION IN MONEY OR MONEY'S WORTH UPON ESTABLISHING THE TWO TRUSTS BECAUSE HIS WIFE'S RELINQUISHMENT OF MARITAL RIGHTS CAME WITHIN THE PROHIBITION OF SECTION 2043(b)

Taxpayers attempt to justify the result reached below and avoid the clear language of Section 2043(b) by contending that the principles of E.T. 19, 1946-2 Cum. Bull. 166 and Rev. Rul. 60-160, 1960-1 Cum. Bull. 374 govern the instant case. (Br. 10-15.) They argue (Br. 12) that these rulings "are not distinguishable on any rational or logical basis" from the facts at bar. However, it is readily apparent from the record that the two trusts

in question were neither established in satisfaction of Jane Glen's support rights nor under the compulsion of the court decree.[1/] Clearly, the Commissioner's rulings have no specific application to this case. Moreover, we fail to see how their "rationale" can be employed to the taxpayers' advantage. Contrary to taxpayers' implied assertions, there is a rational distinction between a property settlement which is incorporated in a divorce decree where the court has the power to vary its terms and one that is not so incorporated. When two parties submit their property agreement to a divorce court for approval and incorporation in the decree, the possibility that the court will disregard their terms and substitute its own makes any indebtedness created out of the settlement one which is founded completely upon the court decree and not upon any "promise or agreement." Surely the parties take a real risk in submitting their property settlement to a divorce court, and it is this risk that merits a difference in estate tax treatment. We maintain that this distinction is the teaching of the Supreme Court in Harris v. Commissioner,

1/ Our position with respect to the inapplicability of these rulings to the present case because of the absence of support rights to a divorced wife under Scottish law and the absence of incorporation of the property settlement in the decree is set forth in greater detail at pages 27-31 of our opening brief. Taxpayers' invocation of the "depletion theory" of E.T. 19 (Br. 10, 15-18) is misplaced since it is clear that property rights upon divorce are rights in capital under Scottish law (I-R. 206) and are therefore intended as a substitute for extinguished inheritance rights. Taxpayers' arguments (Br. 17) to the effect that the divorce need not have taken place or that it might have been brought in another jurisdiction are speculative and were rejected as such by the Tax Court. (I-R. 211-213.)

340 U.S. 106, and is the basis upon which Rev. Rul. 60-160 was promulgated.

Furthermore, we object to taxpayers' characterization of Jane Glen's rights under Scottish law as a "presently existing obligation." (Br. 12.) There is nothing in the record which conclusively establishes that she was entitled to one-third of decedent's personalty. The stipulation as to the law of Scotland existing in 1938 merely states abstract propositions and does not make reference to Jane Glen directly. Cf. stipulation, par. (c). (I-R. 206.) It is indeed strange if Jane Glen could have in fact obtained $333,333 outright, that she would not have done so instead of settling for an interest valued at $190,131.

Conceding that the holding below constitutes an "exception" to previously developed precedent, taxpayers contend that the unique facts of this case with regard to Scottish law support the decision reached by the Tax Court. (Br. 14.) We submit that the facts at bar are not nearly as unique as taxpayers presume, since the law of Arkansas, Maine, and Rhode Island contain provisions almost identical to that of Scotland.[2/] Certain states, such as Kentucky, have judicially established equivalents of a reasonable divorce settlement, which are followed in most cases. See Estate of O'Nan v. Commissioner, 47 T.C. 648, 656-657. In addition, certain community property states such as California and Louisiana

2/ See 3 B Arkansas Statutes, 1947 Annotated (1962 Replacement), Section 34-1214, 10 Revised Statutes of Maine, 1954, Annotated Title 19, Section 721, and 3 General Laws of Rhode Island, Section 15-5-6.

provide for equal division of the community under most circumstances.[3] Finally, it is the Commissioner's contention that apart from the incorrect application of Scottish law by the Tax Court majority, its holding constitutes an impermissible extension of the rule of Harris v. Commissioner, supra, and an erroneous interpretation of Section 2043(b). By limiting the application of Section 2043(b) to the marital rights of a surviving spouse, the decision below clearly impairs the effectiveness of Section 2036 in taxing life estates retained in connection with a divorce settlement.[4]

II

THE VALUE OF THE SON'S INTERESTS UNDER THE TWO TRUSTS CANNOT SERVE AS CONSIDERATION FOR THE TRANSFERS MADE BY DECEDENT

It is the Commissioner's position, as set forth at pages 40-46 of our opening brief, that even if the Tax Court was correct in holding that Jane Glen's relinquishment of marital rights constituted consideration, only the value of the interests she actually received can serve as consideration.[5] The only interest she

3/ See Civil Code, 6 West's Annotated California Codes, Section 146, and 1 West's Louisiana Statutes Annotated, Civil Code, Art. 156

4/ Contrary to taxpayers' contention (Br. 22), we do not view the fact that the transfers were not subject to United States gift tax in 1938 as significant.

5/ Taxpayers urge that the Commissioner has conceded this point (Br. 32-33) because of the language in the Petition for Review. (I-R. 275). Clearly, there has been no concession and taxpayers cannot claim that they have been unfairly surprised. Cf. Bank of America Nat. Trust & Savings Ass'n v. Commissioner, 126 F. 2d 48 (C.A. 9th). This contention was raised in the Tax Court, appears

(Continued on next page)

received was a life estate in the Jane S. Durand Trust valued at $190,131. Taxpayers argue that the allocation of the value of the son's interests as consideration by the Tax Court can be supported on the incorporation of Section 2516 into the estate tax (Br. 25-26) and by the bargaining by Jane Glen on behalf of her son which they contend is evidenced in the record (Br. 30-31).

With respect to the incorporation of Section 2516 into the estate tax, we believe that this argument is adequately covered in our opening brief at pages 35-40. However, we wish to emphasize that even if incorporation of this gift tax provision in its entirety into the estate tax were effected, no part of the transfers in trust other than Jane Glen's life interest could serve as consideration. See Section 2516(1). However, the transfers for the benefit of the son could not qualify since it is clear that the interests created for him were not intended to provide a support allowance during his minority. In this respect, it appears that the Tax Court majority concurs with our position. (I-R. 227.)

Moreover, contrary to taxpayers' contentions, we continue to urge that the record in no way supports the inference that Jane Glen bargained on behalf of her son so as to "transfer" to him the excess of her alleged rights to one-third of decedent's

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5/ (continued)

in the Commissioner's Statement of Points (I-R. 279) and in the Specification of Errors Relied Upon in our opening brief at page 12. The function of the Petition for Review is essentially a notice to the parties and the courts that a review will be taken. Its language should not foreclose this Court from considering this point. See Foreman v. Davis, 371 U.S. 181-182.

personalty over the interests she actually received.[6] There is nothing in the testimony or in Exhibit 8 which would support an inference that decedent created the Robert Story Glen Trust (wherein additional interests for the son were created) at the insistence of Jane Glen. On the contrary, Exhibit 8 states "Further to protect the son, Major G. is to carry out his indicated intention of creating another trust fund ..." (Emphasis supplied.) Given the fact that decedent created the Scotch Trust for his son's sole benefit prior to the commencement of negotiations, it would appear that he needed no prompting to create the Robert Story Glen Trust. In any event, taxpayers having had the burden of proof, have failed to establish that Jane Glen bargained on behalf of her son. Estate of Keller v. Commissioner, 44 T.C. 851.[7]

Respectfully submitted,

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NOVEMBER, 1967.

6/ As we have pointed out supra, it is far from clear that Jane Glen had an absolute right to $333,333, or one-third of decedent's personalty.

7/ Furthermore, the testimony (II-R. 36-37) relied upon by taxpayers (Br. 31) that decedent created the Robert Story Glen Trust in exchange for a limited life estate in the Jane S. Durand Trust is totally unrealistic. Had Jane Glen received a full life interest in the latter trust, it would have been worth approximately

(Continued on next page)

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of November, 1967.

_____
Attorney

7/ (continued)

$208,000. (I-R. 238.) However, what she ultimately received was valued at $190,131. Surely, decedent would not have created additional interests in his son worth $68,460 (I-R. 244) in consideration of decreasing his wife's interests by approximately $18,000. The disparity between these two amounts casts considerable doubt upon the accuracy of the cited testimony and clearly negatives any inference of a "bargaining" situation. These figures are accurate in view of the fact that the record does not reveal that Jane Glen's plan for remarriage was known to decedent at any time prior to its occurrence. (I-R. 253, fn. 2.)